

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

GERALD C. ARENDT and  
DAVID D. BROWN,

Plaintiffs,

v.

WASHINGTON-IDAHO-  
MONTANA CARPENTERS-  
EMPLOYERS RETIREMENT  
TRUST FUND and ZENITH  
ADMINISTRATORS, INC.,

Defendants,

and

UNITED STATES OF AMERICA,

Intervenor-Defendants

NO. CV-11-5135-LRS

ORDER GRANTING MOTION  
TO DISMISS (ECF No. 45)

**BEFORE THE COURT** is the Defendants' Motion To Dismiss (ECF No. 45), filed January 28, 2014. A telephonic hearing was held April 10, 2014. Jeffry K. Finer and Gery R. Gasick participated on behalf of the Plaintiffs; Robin L. Haynes and William M. Symmes participated on behalf of Defendants; and Kenneth E. Sealls participated on behalf of the Intervenor United States. Defendants Washington-Idaho-Montana Carpenters-Employers Retirement Trust Fund (hereafter "Fund") and Zenith American Solutions, Inc., (f/k/a Zenith Administrators, Inc.) ("Zenith") (collectively "Defendants"), jointly move for dismissal of Plaintiffs' First Amended Complaint for Declaratory Judgment and Injunctive Relief (ECF No. 28) ("Amended Complaint") pursuant to Fed.R.Civ.P. 12(b)(6). At the conclusion of oral argument on April 10, 2014, the Court took the matter under advisement. Upon

**ORDER - 1**

1 consideration of the written memoranda, the arguments of counsel, and the record, the  
2 Court grants Defendants' motion as provided herein.

3 **I. PROCEDURAL/FACTUAL BACKGROUND**

4 On September 13, 2011, Plaintiffs filed a complaint against the Secretary of  
5 Labor alleging that the elimination of the subsidized early retirement option of their  
6 retirement plan violated the Due Process Clause of the Fifth Amendment and that the  
7 distinction between early retirees already in “pay status” and those not yet retired  
8 amounts to a violation of the equal protection component of the Due Process Clause.  
9 The background facts that pertain to Plaintiffs’ original Complaint are recited in the  
10 Order Granting Motion to Dismiss entered on March 9, 2014. (ECF No. 16) and will  
11 not be repeated here.

12 On March 9, 2012, judgment was entered by this Court in favor of the  
13 Secretary of Labor. (ECF No. 18). Plaintiffs appealed that judgment to the Ninth  
14 Circuit Court of Appeals. (ECF No. 23). On September 3, 2013, the Ninth Circuit  
15 vacated the trial court judgment and instructed the Court to dismiss the case without  
16 prejudice. The Ninth Circuit ruled that Plaintiff Arendt lacked standing to bring a  
17 claim that the elimination of his early retirement benefits violated the due process and  
18 equal protection clauses. (ECF No. 24 at 3). Because the Circuit found it was without  
19 jurisdiction to rule, the question of the PPA's<sup>1</sup> constitutionality was not decided. (ECF  
20 No. 24 at 4). On October 17, 2013, Plaintiffs filed their First Amended Complaint,  
21 substituting the Retirement Fund Trustees (“the Fund”) and the Plan Administrator  
22 (“Zenith”) as defendants in place of the Secretary of Labor. (ECF No. 28). Plaintiffs'  
23 claims under the First Amended Complaint include: (1) a retroactive taking in  
24 violation of the Fifth Amendment; and (2) gross discrimination among certain Fund  
25 participants in violation of the equal protection clause of the Fifth Amendment.

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27 <sup>1</sup>Pension Protection Act of 2006 (“PPA”), Pub. L. No. 109-280, 120 Stat.  
28 780 (Aug. 17, 2006).

1 According to their First Amended Complaint, Plaintiffs participate in a  
2 collectively bargained multiemployer plan that offered an early retirement pension  
3 benefit known as the “Rule of 80 Early Retirement” pension (“the Plan”) that allowed  
4 participants to retire before age 65 without reducing their basic retirement benefit. In  
5 order to be eligible for the “Rule of 80,” participants had to reach a total of 80 when  
6 adding (i) their age, and (ii) the number of years in which they participated in the plan  
7 and contributed 400 or more working hours. Summary Plan Description and  
8 Retirement Plan, as amended January 1, 2001 (“2001 Plan”), ECF No. 11-2 at 12.  
9 In August of 2009, the Plan notified Plaintiffs and other Plan participants that due to  
10 recent severe investment losses and the decline in the stock market, the Plan was  
11 underfunded and in “critical status.” ECF No. 16 at 2. Because of the financial  
12 insecurity of the Plan—then less than 65 percent funded and projected to be  
13 underfunded for the Plan year beginning July 1, 2013—it was required to take  
14 measures in order to continue funding normal benefits to present and future retirees.  
15 *Id.* Acting pursuant to the PPA, the Plan’s Board of Trustees decided to eliminate  
16 the Plan’s adjustable benefits, including subsidized early retirement. *Id.*

## 17 **II. DISCUSSION**

### 18 **A. Fed.R.Civ.P. 12(b)(6) Standard**

19 A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a  
20 cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable  
21 legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).  
22 In reviewing a 12(b)(6) motion, the court must accept as true all material allegations  
23 in the complaint, as well as reasonable inferences to be drawn from such allegations.  
24 *Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457, 460 (9th Cir.  
25 1994); *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The complaint  
26 must be construed in the light most favorable to the plaintiff. *Parks School of*  
27 *Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). The sole issue  
28 raised by a 12(b)(6) motion is whether the facts pleaded, if established, would support

1 a claim for relief; therefore, no matter how improbable those facts alleged are, they  
 2 must be accepted as true for purposes of the motion. *Neitzke v. Williams*, 490 U.S.  
 3 319, 326-27, 109 S.Ct. 1827 (1989). The court need not, however, accept as true  
 4 conclusory allegations or legal characterizations, nor need it accept unreasonable  
 5 inferences or unwarranted deductions of fact. *In re Stac Electronics Securities*  
 6 *Litigation*, 89 F.3d 1399, 1403 (9<sup>th</sup> Cir. 1996).

7 As it is not necessary for the court to review materials outside of the pleadings  
 8 in order to make its determination in this matter, Defendants' motion is not converted  
 9 to a summary judgment motion under Fed. R. Civ. P. 56 and reliance on the 12(b)(6)  
 10 standard is appropriate.

## 11 **B. Defendants' and Intervenor's Arguments**

### 12 **1. The Fund and Zenith are not government or state actors.**

13 Defendants and Intervenor (collectively "Defendants") argue that Plaintiffs'  
 14 claims for violations of the 5<sup>th</sup> Amendment of the U.S. Constitution must be dismissed  
 15 because the Fund and Zenith are private entities, not government or state actors.  
 16 Citing *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936-937 (1982), Defendants  
 17 conclude that because state action is required for Plaintiffs' Equal Protection and  
 18 takings claims, *Sutton*<sup>2</sup> should apply to and preclude the bringing of their  
 19 constitutional claims.

20 In accordance with the PPA, the Plan sponsor (the Plan's Board of Trustees)  
 21 agreed that one of the ways they would rehabilitate the Plan was by eliminating all  
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23 <sup>2</sup>In *Sutton v. Providence St. Joseph Medical Ctr.*, 192 F.3d 826, 839 (9th  
 24 Cir. 1999), the Ninth Circuit addressed "whether governmental compulsion in the  
 25 form of a general statute, without more, is sufficient to deem a private defendant a  
 26 governmental actor," and concluded that a "plaintiff must establish some other  
 27 nexus sufficient to make it fair to attribute liability to the private entity." *Id.* at  
 28 841.

1 of the adjustable benefits offered by the Plan, including subsidized early retirement.<sup>3</sup>  
2 The Plan did not reduce accrued benefits payable at normal retirement age and did not  
3 cut any benefits of participants who retired and entered “pay status” (as defined in  
4 ERISA § 305(I)(6), 29 U.S.C. §1085(I)(6)) before they were notified that the Plan  
5 was in critical status. Defendants conclude that there is no state action sufficient to  
6 support a constitutional argument in this matter, especially when coupled with this  
7 Court’s previous finding that Plaintiffs’ loss of early retirement benefits pursuant to  
8 a Rehabilitation Plan adopted by their private pension plan, was not an impermissible  
9 taking, regulatory or otherwise, by the Government.

## 10 **2. The PPA is rationally based legislation and not unconstitutional.**

11 In August of 2009, the Retirement Plan, a collectively bargained multiemployer  
12 plan, notified its participants that it had suffered severe investment losses in the stock  
13 market decline of 2008 and early 2009, and was underfunded and in "critical status."  
14 The notice explained that the Plan was less than 65 percent funded and that the Plan  
15 was projected to have an accumulated funding deficiency for the plan year beginning  
16 July 1, 2013. As a result, the Retirement Plan was required under the PPA, to take  
17 steps to resolve its funding crisis so that it could continue to fund normal benefits for  
18 current and future retirees. ERISA § 302, 29 U.S.C. §1082. Although the PPA gives  
19 the plan sponsor (subject to collective bargaining) the ability to make such decisions,  
20 it protects participants' ability to receive normal retirement benefits. ERISA  
21 §305(e)(8)(B), 29 U.S.C. §1085(e)(8)(B).

22 The PPA's express authorization of the reduction or elimination of adjustable  
23 benefits (including early retirement benefits), through rehabilitation plans of those  
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25 <sup>3</sup>“Rule of 80 Early Retirement Pension,” (“Rule of 80”), was funded at  
26 Section 3.08 of the Plan by an allocation of “20% of all negotiated Employer  
27 Contributions” via an additional and dedicated payroll contributions from Active  
28 Participants.

1 plans in critical status, is an exception to ERISA's general "anti-cutback rule."

2 ERISA § 204(g), 29 U.S.C. § 1054(g).<sup>4</sup>

3 Defendants suggest that Plaintiffs' interest in employer-subsidized early  
4 retirement benefits was never absolute, but always was subject to elimination in the  
5 event of plan termination under ERISA Section 4041A, 29 U.S.C. § 1341a.  
6 Moreover, not only is the Government not taking any of the Plan's (or Plaintiffs')  
7 assets away through the PPA, but that legislation is directed to ensuring that plans  
8 facing dire financial circumstances can continue to pay normal retirement benefits  
9 without defaulting.

### 10 **C. Plaintiffs' Argument**

11 In opposing Defendant's Motion to Dismiss, Plaintiffs seek a ruling that the  
12 PPA as applied to Plaintiffs creates (1) an unconstitutional taking under the Takings  
13 Clause of the Fifth Amendment, and (2) a denial of Equal Protection under the Fifth  
14 Amendment.

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18 <sup>4</sup>ERISA's anti-cutback rule provides, with certain exceptions not relevant  
19 here, that "[t]he accrued benefit of a participant under a plan may not be decreased  
20 by an amendment of the plan." 29 U.S.C. § 1054(g)(1). The rule applies to the  
21 participant's basic accrued benefit, as well as to accrued early retirement benefits,  
22 retirement-type subsidies, and optional forms of benefits. 29 U.S.C. § 1054(g)(2).  
23 Such benefits may only be eliminated or reduced by amendment on a prospective  
24 basis, i.e., with respect to benefits that have not yet accrued. *Allen v. Honeywell*  
25 *Retirement Earnings Plan*, 382 F.Supp.2d 1139, 1149-50 (2005) citing *Campbell*  
26 *v. BankBoston*, 327 F.3d 1, 8-9 (1st Cir.2003) (holding that elimination of a future  
27 expected benefit that has not yet accrued does not constitute an ERISA violation).  
28

1 Plaintiffs assert, citing *Eastern Enterprises*,<sup>5</sup> that the Defendants' rehabilitation  
2 plan is mandated by the PPA pursuant to 29 U.S.C. §1085(a)(2)(A) and allegedly  
3 results in a retroactive elimination of previously "earned" and promised benefits.  
4 Therefore, Plaintiffs reason, this presents an "economic regulation" that can "effect  
5 a taking," in violation of the "Takings Clause of the Fifth Amendment." Plaintiffs  
6 claim that Defendants' rehabilitation plan was mandated by the PPA. Plaintiffs  
7 appear to argue, citing snippets of the lengthy *Eastern Enterprises* opinion, that the  
8 "mandated" rehabilitation plan reneged on a promise under contract because such a  
9 rehabilitation plan trumps the protection of ERISA's "anti-cutback" rule and uses "  
10 . . . a shorter cut than the constitutional way of paying for the change." *Eastern*  
11 *Enterprises*, 524 U.S. 498 at 528, 522- 523 (1998), quoting *Pennsylvania Coal Co.*  
12 *v. Mahon*, 260 U.S. 393, 416 (1922).

13 Plaintiffs further argue that they have a fundamental right to subsidized early  
14 retirement benefits and that their constitutional challenge to § 202 of the PPA is  
15 subject to higher scrutiny because its application in this case violates Plaintiffs'  
16 fundamental rights by allowing a retroactive taking of their early retirement benefits.  
17 Plaintiffs conclude that the PPA provision fails such strict scrutiny.

#### 18 **D. Analysis**

19 The Court previously found that Plaintiffs failed to demonstrate any state  
20 action, which is a necessary predicate to a suit alleging due process and equal  
21 protection claims. Similarly, the Court again finds that Plaintiffs' Equal Protection  
22 and takings claims in the Amended Complaint fail to demonstrate any government  
23 action involving these Defendants who are private actors, and whom Plaintiffs allege  
24 were "compelled" to act by the government. The mere existence of the provisions in  
25 the PPA allowing the elimination of adjustable benefits does not amount to state  
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27 <sup>5</sup>*Eastern Enterprises v. Apfel*, 524 U.S. 498, 522-39 (1998).  
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1 action. Unlike the statute that is at issue in the *Eastern Enterprises* case, the PPA  
2 does not mandate a specific course of action but permits discretion to be exercised,  
3 provided that pension plans in critical financial status are addressed in a rational  
4 manner. Although Plaintiffs assert that the notice sent out to participants affected by  
5 the rehabilitation plan has language referencing the mandatory nature of the action  
6 being taken, this does not change the fact that no specific course of action was  
7 mandated by the PPA.

8 The Defendants exercised complete, autonomous discretion in creating a  
9 rehabilitation plan for the Fund. The PPA directed that the Fund's Board adopt and  
10 implement a rehabilitation plan to ensure normal benefits were paid, as the Fund  
11 was less than 65 percent funded and was projected to have an accumulated funding  
12 deficiency as early as July 2013. (ECF No. 11 at Exhibit 1). The collective  
13 bargaining parties to the Fund also agreed with the decision to eliminate the Rule of  
14 80 benefits. No governmental actor coerced, directed, suggested, or even reviewed  
15 Defendants' actions in creating and dictating the contents of a rehabilitation plan.  
16 Simply put, Defendants (the Fund and Zenith) followed the law as private actors.

17 The Court also previously rejected an earlier argument by Plaintiffs relating to  
18 a “takings” claim that did not rely on the Fifth Amendment Takings Clause. Plaintiffs  
19 now specifically allege a takings claim under the Takings Clause. Plaintiffs  
20 essentially seek a determination of whether Defendants violated ERISA's anti-cutback  
21 statute,<sup>6</sup> in eliminating early retirement to those participants that are not in “pay  
22 status.” While it is well established as a matter of law that government regulation  
23 can effect a Fifth Amendment taking,<sup>7</sup> not every economic change required by law  
24 constitutes a “taking” in violation of the Fifth Amendment. *Deltona Corp. v. U. S.*,

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26 <sup>6</sup>Section 204(g), 29 U.S.C. § 1054(g) (2010).

27 <sup>7</sup>*Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123, 98 S.Ct.  
28 2646, 2658, 57 L.Ed.2d 631 (1978),



1 657 F.2d 1184, 1191 (1981).

2 Plaintiffs appear to argue that the early retirement benefit established in §  
3 Section 3.08 of the Plan at issue is protected by the anti-cutback statute, § 204(g), 29  
4 U.S.C. § 1054(g), which Plaintiffs suggest “extends to all participants the right to  
5 ‘grow into’ a benefit subsidy by satisfying the plan's pre-amendment eligibility  
6 requirements.” *See Bellas v. CBS, Inc.*, 221 F.3d 517, 527 (3d Cir.2000). In other  
7 words, Plaintiffs would prefer that if a plan is amended to eliminate a subsidized early  
8 retirement benefit for employees who have completed or nearly completed the  
9 pre-amendment eligibility requirements but are not in “pay status,” an employee  
10 should be given the right to “grow into” early retirement benefits as long as an  
11 employee satisfies, or will be able to satisfy, the eligibility requirements prior to the  
12 amendment or after an amendment to the plan takes effect.

13 Plaintiffs would be eligible for early retirement benefits (retire before age 65  
14 without reducing their basic retirement benefit) provided in the Summary Plan  
15 Description and Retirement Plan at issue, if they had met the Plan eligibility  
16 requirements—primarily attaining a total of 80 when adding (i) their age, and (ii) the  
17 number of years in which they participated in the plan and contributed 400 or more  
18 working hours pre-amendment or before the critical date of August of 2009.

19 The PPA exempted the Defendants’ continued payment of early retirement  
20 benefits already in “pay status” as of a date certain but not thereafter. 29 U.S.C.  
21 §1085(e)(8)(A)(ii) (“exception for retirees”) and §1085 (i)(6) (“pay status”  
22 definition). For example, a proper application approved and placed in pay status for  
23 a “Rule of 80” pension prior to August, 2009, continues to be paid by Defendants.  
24 That same application made in September, 2009, would be denied because the  
25 benefit, although “earned by service,” was extinguished, as in Plaintiffs’ cases,  
26 pursuant to the rehabilitation plan mandated by the PPA.

27 While both Plaintiffs had accrued significant points potentially leading to the  
28 right to retire at age 55 without reduction of benefits, neither Plaintiff was in “pay

1 status” before changes to the pension plan were made. “Adjustable benefits” are  
2 defined in the PPA to include “benefits, right, and features under the plan, including  
3 ... early retirement benefits not yet in pay status.”<sup>8</sup> Plaintiffs, therefore, had an  
4 expectancy that they would receive the supplemental benefit but not an absolute right  
5 to collect under all circumstances and the timing of the rehabilitation plan. Although  
6 Plaintiffs will suffer no economic loss with respect to their normal retirement  
7 benefits, the elimination of early retirement benefits could reasonably be seen as  
8 upsetting their expectation that they would be able to retire early with full benefits.  
9 However, as the Court noted in *Concrete Pipe*, “. . . pension plans had long been  
10 subject to federal regulation, and those who do business in the regulated field cannot  
11 object if the legislative scheme is buttressed by subsequent amendments to achieve  
12 the legislative end.” *Concrete Pipe and Products of California, Inc. v. Construction*  
13 *Laborers Pension Trust*, 508 U.S. 602, 645-46 (1993) (internal quotations omitted),  
14 *citing Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1,15-16 (1976) (“legislation  
15 readjusting rights and burdens is not unlawful solely because it upsets otherwise  
16 settled expectations.”).

17 As for Plaintiffs’ claim that the PPA impinges on their fundamental right  
18 to early retirement benefits under their Rule of 80 Plan, the Court finds early  
19 retirement is not recognized as a “fundamental right” as the great weight of authority  
20 suggests that even public employment is not a fundamental right, at least for purposes  
21 of substantive due process. *Massachusetts Board of Retirement v. Murgia*, 427 U.S.  
22 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). The Court also finds that a challenge to  
23 Section 202 of the PPA under the Equal Protection component of the Fifth  
24 Amendment is subject to rational basis review, not a strict scrutiny review. *Pension*  
25 *Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984); *U.S. Railroad Ret.*  
26 *Bd. v. Fritz*, 449 U.S. 166, 177 (1980). Because Section 202 of the PPA plainly  
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28 <sup>8</sup>ERISA § 305(e)(8)(A)(iv), 29 U.S.C. § 1085(e)(8)(A)(iv).

1 serves legitimate government purposes through means that are rationally related to  
2 those purposes, Plaintiffs cannot meet the “extremely high” burden applicable to  
3 rational basis review. *Richardson v. City and County of Honolulu*, 124 F.3d 1150,  
4 1162 (9th Cir. 1997). It would appear that Congress acted rationally, in theory and  
5 in fact, to protect and preserve Plaintiffs’ and others’ normal retirement benefits, and  
6 to avoid the cost to the Pension Benefit Guaranty Corporation<sup>9</sup> that would occur from  
7 a defaulting pension plan.

### 8 **III. CONCLUSION**

9 The Court believes the result it has reached is proper for the reasons set forth  
10 above and that it is consistent with the legislative goals of ERISA and the PPA,  
11 statutes which are to be construed liberally to achieve those goals. *FHA v. The*  
12 *Darlington, Inc.*, 358 U.S. 84, 91 (1958) (“Those who do business in the regulated  
13 field cannot object if the legislative scheme is buttressed by subsequent amendment  
14 to achieve the legislative end.”). The PPA, which ensures the long-term financial  
15 stability of pension plans, required the Defendants to modify the Plan which was done  
16 in accordance with the PPA. Under the terms of the amended Plan, Plaintiffs were  
17 not entitled to early retirement benefits (an adjustable benefit) because they were not  
18 in pay status.

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22 <sup>9</sup>The Pension Benefit Guaranty Corporation (“PBGC”) is a federal  
23 corporation created under Title IV of ERISA whose purpose is to encourage the  
24 continuation and maintenance of certain private pension plans and to provide for  
25 payment of pension benefits under those plans. ERISA § 4002(a), 29 U.S.C. §  
26 1302(a). At insolvency, the PBGC will provide financial assistance to the plan so  
27 it can provide benefits at the guarantee level. ERISA § 4261(a), 29 U.S.C. §  
28 1431(a).

**IT IS ORDERED:**

1. Defendants' Motion to Dismiss, **ECF No. 45**, filed January 28, 2014, is **GRANTED**. Plaintiffs' claims are dismissed with prejudice.

2. The District Court Executive is directed to:

(a) enter this order;

(b) enter judgment consistent with this order; and

(c) close this file.

DATED this 2nd day of May, 2014.

*s/Lonny R. Suko*

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LONNY R. SUKO  
Senior United States District Judge